No. 11629.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ELY A. TODOROW and LEONARD A. POTOLSKI,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

STATUTES

TEXTBOOKS

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Jurisdiction.

Jurisdiction is conferred by Title 28, Sec. 225, U. S. C., and Title 18, Sec. 80, U. S. C.

This is a criminal appeal. Appellants were sentenced on May 9, 1947 [R. 42] and filed notice of appeal May 9, 1947 [R. 45], within the time fixed by law.

Statutes Involved.

Section 80. (Criminal Code, Sec. 35(A).) *Presenting false claims:*

> "Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United

States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious or fraudulent; or whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. (Mar. 4, 1909, c. 321, sec. 35, 35 Stat. 1095; Oct. 23, 1918, c. 194, 40 Stat. 1015; June 18, 1934, c. 587, 48 Stat. 996; Apr. 4, 1938, c. 69, 52 Stat. 197.)"

Brief Statement of the Case.

This is an appeal from a conviction of appellants on count 4 only of an indictment, in which appellants were charged with causing one Byron N. Taylor, on or about July 11, 1946, to make false and fraudulent statements and representations in a matter within the jurisdiction of the War Assets Administration [R. 5].

Appellants are both war veterans, having served honorably in World War II. Leonard A. Potolski was with Patton's Third Army in Europe for 4 years and Ely Todorow trained as a paratrooper. They met in 1946. Potolski became a dealer in automobiles after his discharge following his return from Germany [R. 217]. He met Todorow in Albany, N. Y., after he came back from serving in General Patton's Army [R. 265].

Having heard of the sale of surplus trucks at Port Hueneme, California, they came to California and bought 25 each [R. 268]. Thereafter it became necessary for them to have the trucks driven away and they hired various drivers to do so. They were stopping at the Alexandria Hotel, where Byron N. Taylor, an ex-war veteran, also worked [R. 175]. They offered him a chance to drive away some trucks. He also sought an opportunity to buy surplus and resell it.

While the sale opened up in May with a preference to war veterans, the terms and conditions of the sale changed during different days and dates, both as to whether there was or was not a preference to war veterans. By July 2nd the local rules had changed so that there was no preference to veterans or non-veterans, but any dealers could buy on a first-come, first-served basis. This condition prevailed on July 11, 1946, the date of the alleged offense.

On that day the appellants went down to Port Hueneme with Byron Taylor, whose services they sought to drive some of the trucks away, but got down there too late. While Taylor was there he made out an application for a veteran's preference (although none was on that date necessary), in which he indicated that he was going to pick out six refueler tanks. The application was never used and the tanks were never purchased by Taylor or by the defendants from Taylor, but all of the papers were torn up and destroyed when an investigator for the War Assets Administration called on the appellants at the Alexandria Hotel and told them that it was not permissible for them to use the Taylor application.

On the way back from Port Hueneme, another veteran, named Gordon Lauridsen, demanded $50.00 from the ap-

pellants for his services in having gone down to Port Hueneme that day. They gave Taylor $20.00 for his services, although he arrived too late to drive any trucks away. Lauridsen was dissatisfied [R. 228].

Government witnesses testified that on July 11th, the date when Taylor went to Port Hueneme, not only could a person who was a veteran or non-veteran purchase any of the articles offered [R. 114] but a person who purchased trucks could resell them to anybody else [R. 124.]

From the start of the case to its conclusion the trial judge was quite irritated at the defendants, which irritation commenced even prior to their arrival, and from time to time he exhibited his prejudicial feelings toward both defendants and their counsel, as shown by his remarks and even the final instructions which he gave to the jury. We will elaborate in detail under the specification on fair trial and the denial of due process and effective aid of counsel.

Appellants specify the following errors in the record on which they rely:

(1) The evidence was insufficient to support the verdicts. The verdicts are contrary to the law and the evidence.

(2) The Court misdirected the jury in its instructions to the jury.

(3) The Court was guilty of prejudicial misconduct with reference to counsel in the case in its instructions to the jury.

(4) The Court was guilty of prejudicial misconduct in the trial of the case and denied to appellants the full benefit of counsel in violation of the Fifth Amendment to the Constitution of the United States. The appellants were denied a fair trial.

(5) The indictment fails to state an offense against the laws of the United States.

(6) The Court erred in denying appellants, and each of them, a bill of particulars.

(7) The Court erred in the admission and exclusion of evidence.

a. The Court erred in the admission of evidence regarding a transaction with one Gordon W. Lauridsen, another veteran not name in the indictment [R. 160, 161, 165, 166, 325 and 326]. This evidence related to a transaction in which Lauridsen filed a request for a certificate with the War Assets Administration. The evi-evidence is set up in verbatim in the brief under the heading of Omission and Exclusion of Evidence.

b. The Court also erred in permitting cross-examination of the defendant Ely Todorow regarding the data placed by him on his own application form for surplus property, which related to his being licensed as a dealer in the State of New York. The evidence regarding this transaction is set out verbatim and the objections thereto are set out verbatim under the heading of improper omission and exclusions of the evidence.

c. The Court also erred in the limitation of cross-examination of the principal Government's witness Byron Taylor, as set out in *haec verba* under the heading of Admission and Exclusion of Evidence and in reprimanding defense counsel for asking the question.

(8) The Court erred in instructions given and refused.

I.

The Evidence Was Insufficient to Support the Verdicts. The Verdicts Are Contrary to the Law and the Evidence.

The evidence is insufficient in this, that:

A.

(1) There was no evidence of any rule, regulation or order existing on July 11, 1946, regarding which appellants made any false or fraudulent statements in a matter within the jurisdiction of the War Assets Administration, or by which they caused Byron N. Taylor to make such a false and fraudulent statement or representation.

Without proof of any regulation, rule or order, the statements which are claimed to have been caused to be made become immaterial.

(2) No prosecution can be founded on a matter within the jurisdiction of an agency of the United States unless that matter is shown actually to exist by a lawful rule, regulation or order, properly promulgated, and of which the accused has notice and an opportunity to learn thereof.

Even if a rule or regulation is charged, governing a department or agency of the United States, on which a criminal prosecution is later sought to be founded, it must be so definite and certain that any person of common understanding may know what is intended.

> *M. Kraus Bros. Co. v. U. S.*, 327 U. S. 614, 90 L. Ed. 894.

In this case the prosecution claimed (but did not prove) that there were certain rules or regulations which governed the sale of surplus property at Port Hueneme,

California, and that the appellants caused Byron N. Taylor to make statements in a veterans' application for surplus property and a purchase-requisition form, on or about July 11, 1946, at Port Hueneme, in connection with the purchase of six tank refueler trucks [R. 5-6]. (No purchases were ever made.)

The Government did not introduce any rule or regulation covering the sale of these trucks, but put on Curtis Alexander, manager of the automotive and construction equipment sales at Port Hueneme [R. 108].[1]

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[1]Mr. Alexander testified as follows:

"Q. (By Mr. Harrington): Now referring to your testimony, you testified that that sale commenced May 20, 1946, is that correct? A. Yes.

Q. During the first period of the sale were there restrictions with respect to the sale of the trucks? To put it another way, were there certain people who could get the trucks and other people who could not? A. The trucks were offered for sale to veterans of World War II only.

Q. Commencing May 20, 1946? A. Commencing on May 20th.

Q. And subsequently were there changes in your orders with respect to whom you could sell the trucks to? A. Yes; there were changes later.

Q. Would you relate what changes occurred between that period and, say, July 15, 1946?

Mr. Lavine: Now, just a minute. I object to that as not the best evidence, irrelevant, incompetent and immaterial, not binding on these defendants.

The Court: Were these rules in writing?

The Witness: Changes, you mean, Your Honor?

The Court: Yes.

The Witness: Yes; the changes were made in writing.

The Court: Any written instructions?

The Witness: In advertising.

The Court: Did you have any writing?

The Witness: Yes.

Mr. Harrington: Maybe I can clarify the point, Your Honor, by a couple of other questions. Withdraw that question.

Q. Mr. Alexander, as head of that section at Port Hueneme, who did you work under? A. Under the Los Angeles

There were various changes made in the orders from time to time [R. 112-114]. Then the witness testified that on July 2nd, any licensed automotive dealer could buy without any preferential basis [R. 114]. The witness testified as follows:

> "The Court: Would a veteran, commencing July 2nd, have any priority over an automotive dealer?
>
> **The Witness: No, your Honor. He would be just on a first served basis. The federal government could purchase on that date, too, but no one had any priority over anyone else.**
>
> The Court: Commencing July 2nd, 1946?
>
> The Witness: Yes, Your Honor." [R. 114.]

While the witness referred to "existing directives" no directives or orders or regulations were introduced in evidence. Hence, on July 11th, when the alleged occurrence took place (which was never completed, as no use was made of the claimed documents) according to the witness, sales of trucks were open to any licensed automotive dealer, whether they were veterans or non-veterans.

The objective of having a veteran's preference did not exist as of that date.

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regional office. My immediate superior is Mr. Fry who is chief of the automotive and construction division equipment for this region.

Q. Were there occasions during the course of this sale that you received orders from Mr. Fry to make changes in the people and classes of people that you could sell them to? A. Yes; there were.

Q. Were there instances that you received oral orders and other instances in which you received written orders? A. That is correct." [R. 110-111.]

It is respectfully submitted that, without specific proof of a regulation, order or directive, the evidence is insufficient to establish a basis for a false claim or false statement in a matter within the jurisdiction of the Government.

It would then be immaterial, and, we submit, that the rule applicable in perjury cases should apply.

Kuskulis v. U. S., 37 F. (2d) 241.

The only way of determining whether such a statement was or could be false would necessarily have to be based upon causing someone to make a statement, which was material and germane to the particular issues and which was necessarily contrary to a ruling or regulation.

B.

The prosecution's case is founded on a contention that there was a *preference* to veterans on *July 11, 1946,* in the purchase of trucks, and that the appellants caused Byron N. Taylor to make a statement in an application, which was contrary to the rule, regulation or directive. However, the Government failed to produce any such rule, regulation or directive and, therefore, the statements which Byron Taylor made in his application were immaterial.

There is another reason why they were immaterial, and that is that on July 11, 1946, according to the Government's own witness, there was no longer any preference as between veterans and non-veterans, but non-veteran dealers could purchase the trucks the same as anybody else. It was not shown that there was any necessity for any veteran to make any application, or that such application put him in any different category or position

than any non-veterans, or that there was any rule, regulation or directive which governed veterans and non-veterans.

In *M. Kraus Bros. Co. v. U. S.*, 327 U. S. 614, 90 L. Ed. 894, the Supreme Court of the United States held that before one can be prosecuted for violating a rule or regulation, the rule or regulation must be explicit and unambiguous, and must adequately inform those who are subject to their terms what conduct will be considered evasive so as to bring criminal penalties into operation. The dividing line between unlawful conduct and lawful action cannot be left to conjecture.

In that case the regulation was published and made known in the Federal Register. The Court said:

> "* * * The prohibited conduct must, for criminal purposes, be set forth with clarity in the regulations and orders which he is authorized by Congress to promulgate under the Act. Congress has warned the public to look to that source alone to discover what conduct is evasive and hence likely to create criminal liability. United States v. Resnick, 299 U. S. 207, 81 L. Ed. 127."

In the present case the regulation or directive which it is claimed provided the basis for governing the conduct of the applicant was never presented to the court or jury and, therefore, the entire basis for the prosecution as to whether any false statement was made was left to conjecture.

The sale at Port Hueneme was governed apparently solely by local procedure. It was a sale which had been arranged by the local officer and he changed his instructions from day to day, according to his own ideas and determinations. He stated that there were directives,

but none were introduced or presented in the case. Surely, a prosecution cannot be based upon a change from day to day of rules, regulations or directives, and upon an application which it was never shown was necessary or required to be made at the time of the sale involved, and which was, therefore, entirely immaterial.

No rule, regulation or directive was either introduced in evidence or read to the jury.

Corson v. U. S. (9th Cir., 1944), 147 F. (2d) 437-438;

Bailey v. U. S. (9th Cir.), 13 F. (2d) 325, 327;

Williams v. U. S., 66 F. (2d) 868;

U. S. v. Noble, 155 F. (2d) 315;

Bird v. U. S., 180 U. S. 356, 361, 45 L. Ed. 570;

Capital Traction Co. v. Huff, 174 U. S. 1, 13, 16, 43 L. Ed. 873;

Patton v. U. S., 281 U. S. 276, 288.

While in these cases there was a failure to give a full instruction to the jury on the law, in the present case there was nothing presented either in the evidence or in the instructions to the jury by which the jury could know that there was any rule, regulation or directive which required a statement of the character made by Byron N. Taylor and, therefore, there could be no basis that it was false or fraudulent, or material.

In his opening statement to the jury, Mr. Harrington, counsel for the Government, outlined his position as follows:

"The Government expects to prove as to the War Assets Administration, that one of the fundamental

objectives of their work under the rules and regulations under which they operate was to give veterans a preference." [R. 74.]

The Government, however, failed to prove any rule or regulation which operated to give veterans a preference on July 11, 1946, the date when the transaction took place. On the contrary their own witness stated that there was no preference on July 11, 1946 [R. 114].

Curtis Alexander testified that, commencing July 2, 1946, the sale was open to non-veterans as well as veterans, and there was no prohibition against dealers reselling to anyone else, and anyone could buy on July 11, 1946, from dealers—dealers who were non-veterans could buy up to 25 units of tank refueler trucks, and could resell them at a profit [R. 124] and later on surplus trucks and material that had not been sold were offered at a lesser price to dealers [R. 128]. A large number of the trucks were sold to non-veteran dealers in July and August [R. 129].

C.

The evidence nowhere actually establishes that the defendants, or either of them, caused Byron N. Taylor to make a false statement or representation within the jurisdiction of an agency of the United States. Taylor testified that after he got into the certification shack he did not know what to put down under the question on the form he was writing as to "Description of Enterprise." He said he then referred to Mr. Todorow. He walked

over to him and asked him as to what business he ought to put down.

> "The Court: And what did he say?
>
> The Witness: He said that there was no question as to what business I was going in and that anything would be sufficient." [R. 184.]

The witness did not claim that Potolski told him *anything.*

The evidence of appellant Potolski was that he never was in the certification shack at all when Mr. Taylor was in there [R. 229]. This is corroborated by Mr. Wrabek [R. 158]. Appellant Todorow also denied that he was in the shack or that he told Mr. Taylor to make any false statement [R. 295]. He testified that Taylor never bought any of the trucks for which he sought the certification, and that none were acquired; that at that time it was possible for him to have bought the trucks from other veteran dealers for $25.00 profit [R. 294]. The sales at that time were open to anybody, veterans or non-veterans, on a first come, first served basis [R. 281]. It was the understanding that if any of the refueler tanks or trucks were ultimately bought, Taylor was to get $25.00 a truck, the same as any other dealers were receiving [R. 252].

On the basis of this evidence, there is nothing to show that the appellants or either of them caused Taylor to make a *false* and *fraudulent* statement to the Government or that they told him to make the statements he made.

Taylor's testimony is contradicted by Wrabek. Referring to Lauridsen and Taylor, Wrobeck said:

> "They both entered the office; they both made out the applications and they came up to my desk together. And when I questioned Lauridsen, I thought there was probably something—
>
> The Court: * * * What was said? A. Well, he was unable to answer my questions properly and Mr. Taylor was prompting him, and that is why I brought up the question: 'Are you two partners?'
>
> * * * * * * * * *
>
> The Witness: And if you are partners, only one can do the buying." [R. 167.]

At no time did Wrabek or any stenographer or employee hear the defendant Todorow say anything to them or tell them what to say.

Quantum of Proof.

There is no corroboration whatsoever of Taylor's statement. Like perjury, in a case of this kind there ought to be two witnesses; otherwise a person who claims he himself made false statements can by his mere oath transfer his own culpability to someone to whom he is seeking to shift the responsibility in order to himself escape. The indictment did not jointly charge Taylor and appellants, but charged appellants alone.

The case is somewhat similar to that of Mrs. Sykes in *Sykes v. U. S.*, 204 Fed. 909, wherein the court quoted Wharton on Criminal Evidence, 9th Ed., Sec. 422, point-

ing out that a person like Taylor could by his mere oath transfer conviction to another. Here the court said regarding some of the stolen mail sacks which were recovered in the mail robbery, and which Mrs. Sykes claimed to have seen at a given location, and which she blamed others for the situation, as follows:

> "Witnesses testified that after she made this affidavit they went to the place where she testified Sykes threw the gunny sack and found one there, and this testimony is claimed to be corroborative of her evidence. But it is not so, because it does not identify or connect Sykes with the mail bag, or the gunny sack, or the crime as the perpetrator thereof, and that is the only part of her bag-hiding story that was material to the issue cited. She may have placed the gunny sack there herself, some stranger may have done so, and she may have seen it there on some of her rides. Burnhardt, who she says procured the gunny sack, may have hidden the mail bag and thrown the gunny sack where it was found, and he may have told her that he did so, or she may have seen him do it. The fact that the mail bag and the gunny sack were found where she said Sykes placed them, while it tended to show that this confessed criminal knew where the gunny sack was placed, had no more tendency to prove that Sykes put them there than it had to prove that any member of the jury, or any other innocent man did so."

See, also, *Dahly v. U. S.,* 50 F. (2d) 37 and 17 Corp. Jur., Secs. 3594-3596; *U. S. v. Murphy* (D. C.), 253 Fed. 404; *Jahnke v. State,* 68 Neb. 154, 94 N. W. 158, 104 N. W. 154; *Green v. State,* 6 Okla. Cr. 585, 120 Pac. 667; *Stanford v. State,* 16 Okla. Cr. 107, 180 Pac. 712; *Mickle v. U. S.,* 157 Fed. 229 (C. C. A. 8); *State v. Moe,* 68 Mont. 552, 219 Pac. 830; *State v. Wilson,* 76 Mont. 384, 247 Pac. 158; *Cooper v. State,* 130 Miss. 288, 94 So. 161; *McGinnis v. U. S.,* 256 Fed. 621.

It is also similar to the case of perjury where the United States Supreme Court has upheld the two-witness rule necessary to establish perjury. Otherwise, as Blackstone points out, a perjurer could by his mere oath involve someone else in his own misdeeds.

In *Weiler v. U. S.,* 323 U. S. 606, 89 L. Ed. 495, 498, the Supreme Court said:

> "* * * we cannot reject as wholly unreasonable the notion that a conviction for perjury ought not to rest entirely 'upon an oath against an oath.'"

This is basic in the law of our jurisprudence and the mere statement of Taylor should not be sufficient as a matter of law for him to transfer the guilt of his claimed acts to the appellants on his mere oath.

In any event, as of the date of the Taylor transaction it was entirely immaterial whether Taylor bought or some dealer not a veteran bought, as all were privileged to buy and sell under the admitted testimony. There was

no further use made of the statement or application, and the matter ended there.

The evidence was also insufficient in this respect, that nowhere is there any evidence that the transaction was a matter within the jurisdiction of an agency of the United States. The matter seems to have been assumed, but never proved. Curtis Alexander testified that he was an employee of the War Assets Administration, but nowhere is there any evidence that the sale took place or or was a part of a transaction within the War Assets Administration of the United States. This was an essential fact to be proven by the Government. The proof is entirely lacking and there is a fatal variance. Sales were being made of surplus property by private persons and at private places; also by various governmental agencies independent of W. A. A. There is nothing to show that the particular transactions were under the jurisdiction of the United States.

For the foregoing reasons the trial court should have granted the motions for judgment of acquittal at the close of the government's case and at the close of the defendants' case and upon motion after verdict, and erred in denying these motions.

This Court should therefore either enter judgment of acquittal, or should direct the trial court to do so now, as it was its duty to do at the time of trial under the state of the evidence and the lack of proof of guilt.

II.

The Court Ered in Instructions Given and Refused.

The Court erred in giving the following instructions to the jury, which were vigorously objected to:

> "In each of the four counts of the indictment it is charged that certain statements and representations contained in the 'Veterans' Applications for Surplus Property' and the 'Purchase-Requisition Forms' were false and fraudulent in several particulars. **It is not necessary for the Government to prove that such statements and representations were false in all the particulars charged, or that the defendants caused every such statement and representation to be made as charged.** If you are convinced beyond a reasonable doubt that from the evidence as to each count **that one or more of the statements of representations charged in each count was false as charged,** and that the defendants knowingly and wilfully caused such false statement or representation to be made to the War Assets Administration, then knowing it to be false, the Government's burden of proof in this regard has been sustained." [R. 345-346.]

This instruction was objected to during the period prior to the jury retiring and renewed again after the Court had given the instruction. This instruction was erroneous.

Kramer v. U. S., 325 U. S. (Footnote 45):

Stromberg v. California, 283 U. S. 359, 368, 75 L. Ed. 117, 1122;

Williams v. North Carolina, 317 U. S. 287, 292, 87 L. Ed. 279, 282.

The Court erred in connection with the instructions given and particularly with reference to an instruction that it was only necessary for the Government to prove one alleged misstatement, although several were charged in the count in the indictment.

Where an offense of making a false statement is charged, *in solido,* it is incumbent upon the Government to prove the charge in its entirety and part of it cannot be separated from the rest.

> *Welsh v. State,* 88 Tex. Criminal 346, 227 S. W. 301.

There is a general principle of law also on which this necessarily rests, that in a situation such as this the verdict might not be unanimous, because four jurors might have believed that a defendant caused one statement to be made, four jurors might have believed that a defendant caused another statement to be made, but none of the jurors agreeing that a defendant caused the particular statement to be made upon which guilt might rest.

> *People v. Meraviglia,* 73 Cal. App. 402.

The Court erred in giving the following instruction:

> "* * * Statements and arguments of counsel, and stage-play and acting and flirting with the jury by counsel are not evidence in the case. * * *" [R. 339.]

After the Court gave this instruction to the jury, the following took place:

> "Mr. Lavine: Yes, sir. The other instruction Your Honor amplified, the instruction at page 13, beyond what Your Honor tendered to us prior to instructing the jury.

The Court: Yes. And I want the record to show, Mr. Lavine, that I did that on account of your constant flirting, your playing, your acting with the jury. That is the reason I amplified that instruction.

Mr. Lavine: There was no stage play on my part.

The Court: All right. I do not care to discuss it with you. I had that in the last case I tried, you turning around and smiling at the jury, and you did it in this case. I want the record to show it and that is the reason I told the jury that. In every case where you appear, where you carry on those tactics, Mr. Lavine, I am going to instruct the jury accordingly. I have told you and you know how to conduct yourself in a court room. You are a smart and able lawyer, and I am tired of your tactics. It does not show in the stenographic record.

I am going to start stopping you every time you appear in my court, and describe in the stenographic record the kind of remarks, the smiling, and your mock courtesy that you produce here in this court.

Mr. Lavine: There is no mock courtesy. and certainly being pleasant in the court room does not constitute stage play.

The Court: Proceed with your objections.

Mr. Lavine: I want the record to state my position in the matter, Your Honor.

The Court: Very well.

Mr. Lavine: There was no flirting with the jury; there was nothing except courtesy to the court and all persons. I try to be pleasant at all times. I do not have a serious funeral expression on my face. But this instruction was not offered to counsel prior to being given to the jury.

The Court: I am not required to offer instructions to counsel. I do it as a courtesy to counsel. The rule only requires me to advise counsel of my action upon their requests for instructions. I am not required under the rules to tell the instructions I propose to give to the jury. I do it as a matter of courtesy and furnish a counsel copies wherever possible, so they may not only hear them but they may sit down and read them and consider them. I do that as a courtesy to counsel.

Mr. Lavine: I submit there was no evidence upon which to base those instructions and respectfully except to them. Those are the two exceptions, Your Honor.

The Court: Very well, Mr. Bailiff, will you—

Mr. Lavine: Wait a minute, Your Honor. There is one other. Might I have just a moment?

The Court: You may take all the time you require.

Mr. Lavine: In order to complete my other objection, Your Honor, I now assign Your Honor's instruction No. 13, as read by you, as misconduct and ask Your Honor to instruct the jury to disregard it, so my record is complete on it.

The Court: I am telling them to disregard it. I tell them to disregard everything that the lawyers say in the court room as far as it being evidence is concerned in this case.

Mr. Lavine: No, Your Honor, to disregard Your Honor's instruction.

The Court: You want me to tell them that I was wrong?

Mr. Lavine: In giving that instruction.

The Court: In giving note to your stage play and your flirtation with the jury?

Mr. Lavine: I want Your Honor to tell them to disregard it.

The Court: No; I won't tell them any such thing. The record will show your objection. Will you bring the jury?"

The Court erred in giving the instruction as quoted and in refusing to instruct the jury to disregard it as misconduct upon the request of defense counsel. The instruction was obviously designed to affect and discredit defendants' counsel in the eyes of the jury. There was nothing that defense counsel had done at any time which warranted such a statement to the jury, and it in effect nullified the argument of defense counsel to the jury by discrediting him in the eyes of the jury.

Bollenbach v. U. S., 326 U. S. 607.

To have given the jury such an instruction was highly prejudicial and denied the defendants the full right and benefit of their counsel before the jury by discrediting defendants' counsel of their own choice in the very presence and hearing of the jury. Such action was misconduct on the part of the trial judge, promptly called to his attention, with the request that he instruct the jury to disregard his remarks, which he refused. Such procedure and proceedings denied the defendants the fair trial guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States.

A.

The Court also erred in refusing to give defendants' instruction No. 19, reading:

"If the intermediary or intermediaries through whom statements and representations were allegedly made were not innocent intermediaries you must find whether the acts were proximately caused by the ac-

cused or were those of the intermediary without such proximate cause. If the acts were those of the intermediary without such proximate cause you must acquit the accused." [R. 28.]

The defendants were entitled to this instruction to determine whether Byron Taylor did those things of his own volition or whether they were proximately caused by either defendant or by both.

In this case it was necessary for the jury to determine if the witness Taylor was an accomplice as a matter of law and, if so, whether his testimony should be viewed with caution and distrust. It was also a question of fact to determine whether Taylor, who was not being prosecuted, did these things of his own accord, or whether any of the things that the appellants or either of them did caused him to do those things. In either event, the appellants were entitled to the proposed instruction and which the Court refused to give.

Screws v. U. S., 325 U. S. 91;
Bollenbach v. U. S., 326 U. S. 607;
People v. Putnam, 20 Cal. (2d) 885;
People v. Warren, 20 Cal. (2d) 103.

B.

Defendants' instruction No. 16 [R. 27] should have been given. This instruction read as follows:

"The time when an event occurred and the presence or absence of a defendant at the place of occurrence are relevant matters for your consideration as to the guilt or innocence of the accused. Where a

> prosecution witness says that an accused is present at an occurrence and the defense offers evidence that he was absent at the time and place specified all that is necessary is that such evidence raise in your mind a reasonable doubt as to the guilt of the defendant in order to justify an acquittal of such accused."

This was in effect an alibi instruction as to the appellant Potolski, who was not present in the certification shack at the time of the alleged "causing". Like any other alibi instruction which a defendant might offer, he was entitled to have it given to the jury.

People v. Morris, 3 Cal. App. 1;
People v. Waits, 18 Cal. App. (2d) 20.

Defendants' instruction No. 5 [R. 22] likewise should have been given, which read as follows:

> "You are instructed that the conduct in the act of the parties subsequent to the alleged offense or offenses, if any, is relevant for the purpose of determining whether in fact the defendants committed any offense or whether an offense was in fact committed."

This related particularly to the testimony of the defendants when officers of the War Assets Administration came to them and told them that they were not supposed to purchase from veterans [R. 233], and the officers said: "No. This is just a routine check." Potolski testified "We destroyed them (referring to the papers). We never secured the trucks or never took them" [R. 234].

III.

The Indictment Fails to State an Offense Against the Laws of the United States.

The indictment alleges false and fraudulent statements and representations in a matter within the jurisdiction of the War Assets Administration. It then alleges a matter of *authorizing* and *approving* the sale of certain surplus property located at Port Hueneme, California. It does not state that said property was then the property of the United States, or that the sale was being conducted by the War Assets Administration, an agency of the United States, or at or under the direction or auspices of the United States.

It does not state that the veteran's application for surplus property and the purchase requisition form, which were filled out by Byron Taylor, were the forms then used and required to be used by the War Assets Administration; nor that any rules, regulations or procedure required the making of such form on and as of that date; nor that that matter was within the jurisdiction of the United States, nor that the form was a correct form as required on that date, or that a purchase could not be made by any persons, veterans or non-veterans on that date for the reason set out in the application.

An accused is clothed with the presumption of innocence, and where the indictment may be construed equally consistent with innocence as with guilt no type of offense is made out.

People v. Schmitz, 7 Cal. App. 330;

People v. Davenport, 21 Cal. App. (2d) 292;

U. S. v. Frankfeld, 38 Fed. Supp. 1018.

IV.

The Trial Court Erred in the Admission and Exclusion of Evidence in This Case.

"Q. Did you read this part: 'It is a criminal offense and a felony, to make a wilfully false statement or claim, directly * * * to any Government agency,'—did you read that? A. I didn't read that particular paragraph.

Q. You know now that you did commit a felony at that time?

Mr. Harrington: I object to that, your Honor, There is no evidence of that.

The Court: You do not need to answer that. Put another question." [R. 204.]

It was prejudicial error for the court to exclude the answer to this question, because (1) it went to the state of mind of the witness, and (2) his interest, his prejudice, his bias and his motive in the case.

People v. Pantages, 212 Cal. 237.

It also was important in determining that Taylor was an accomplice and to determine whether he acted of his own volition or for other reasons. If he was an accomplice his testimony had to be regarded with caution and distrust.

It will be noted that the Court chopped off defense counsel in his questioning of Taylor, the principal witness in the case in this transaction on the fundamental issue of guilt or innocence involved in it. The Court not only chopped off defense counsel, but his remark was such as to put defense counsel in a bad light before the jury. The

case comes squarely within the decision of *Sandroff v. United States,* 158 F. (2d) 623, at 629, where the Court said:

> "* * * The two Ginns were the chief and indispensable Government witnesses in the prosecution of Sandroff and his company. In such circumstances, it was highly important that latitude be allowed in cross-examination to test their motives for testifying against Sandroff as bearing directly upon their credibility. The district court emphasized its error by declaring in the presence of the jury that it was incompetent, irrelevant and wholly foreign to the issues in the case to show why Charles Ginns had not been included as a defendant in the indictment.
>
> "The decision and opinion of this Court in Farkas v. United States, 6 Cir., 2 F. 2d 644, 647, is directly in point * * *."

The Court also pointed out other cases where the right of cross-examination of a prosecuting witness is one of the broadest, to-wit: *Alford v. U. S.,* 282 U. S. 687, 692-694, 75 L. Ed. 1624.

The Court permitted the witnesses Clayton John Wrabek and Byron N. Taylor to testify to an alleged transaction had by one Lauridsen, although the transaction was not charged in any indictment, "for the limited purpose of determining the state of mind with which the defendants acted" [R. 192].

Considerable testimony was admitted regarding the Lauridsen transaction and what Lauridsen had said and done and discussed in the presence of the defendants, although Lauridsen was not produced as a witness [R. 193-200].

The Court also admitted the testimony of Wrabek regarding Lauridsen's conversations with Taylor. Wrabek did not remember Potolski being present in the certification shack. He testified that when he questioned Lauridsen "he was unable to answer my questions properly and Mr. Taylor was prompting him, and that is why I brought up the question: 'Are you two partners?' * * * And if you are partners, only one can do the buying." [R. 167.]

The Court stated that it permitted the evidence with respect to the Lauridsen transaction for the limited purpose which he had instructed the jury [R. 168].

It was prejudicial error for the Court to admit the Lauridsen transaction regarding other claimed false statements not charged in the indictment, by which under the statute testimony of other transactions could be used as the basis for attempting to find appellants guilty.

People v. Albertson, 23 Cal. (2d) 550;

Bird v. U. S., 180 U. S. 356.

"Q. By Mr. Harrington: Item No. 7 on the subpoena, Mrs. Clark, do you have that? A. Yes; Gordon W. Lauridsen. * * * It is V 33 D 34005; that is the case number; and the certificate and the application.

Mr. Harrington: And may this folder entitled 'Gordon W. Lauridsen,' containing the documents the witness just mentioned, be marked for identification as Government's next in order?

The Clerk: Government's Exhibit 7 for identification.

Q. By Mr. Harrington: Mrs. Clark, is it part of your duties as an employee of the War Assets Administration to keep the official records of that

agency? A. For the veterans' section. We have all the records for the veterans' section in our files, the applications and all.

Q. And are the records that you just produced kept in the ordinary course of business of the War Assets Administration? A. Yes; they are there in our files.

Q. And upon the receipt of the subpoena did you go to the official files of the War Assets Administration, the veterans' branch, and secure those documents? A. Yes, sir; I did." [R. 102.]

"Mr. Harrington: At this time, if the court please—

The Court: Exhibit 7 still remains for identification.

Mr. Harrington: —solely on the proof of intent, the Government now offers 7 for identification, which is the application form and the veteran's preference signed by Gordon P. Lauridsen.

Mr. Lavine: To which we object as irrelevant, incompetent and immaterial, not with ___ the issues of the case, no corpus delicti established, no proper foundation shown.

Mr. Baughn: It does not prove or disprove any issues.

The Court: Who is Lauridsen? Did he work at the hotel?

The Witness: Yes. He was another veteran working at the hotel the same time I was.

The Court: What was he doing at the hotel?

The Witness: He was a parking attendant.

The Court: What do you mean by a 'parking attendant'? A. Well, he worked in the hotel garage, your Honor, parking cars.

Mr. Harrington: Furthermore, at this time, if the court please—

The Court: Just a moment.

Mr. Harrington: I am sorry.

The Court: Was he with you in the certification shack or building?

The Witness: Yes; he was, your Honor.

The Court: Building W and Building X?

The Witness: He was in all three buildings at the same time.

The Court: All this process that you went through, he went through with you, did he?

The Witness: Yes, your Honor.

The Court: Objection is overruled to Exhibit 7 and Exhibit 7 for identification is received in evidence.

I will caution the jury again that the transaction with respect to Lauridsen, all of it with respect to Lauridsen, may be received only for the limited purpose of determining the state of mind with which the defendants acted, if you find from other evidence that they did act as charged in the indictment. The defendants are not charged in the indictment with any transaction involving a person by the name of Lauridsen." [R. 190-192.]

Further testimony regarding Lauridsen was permitted as follows:

"Q. Calling your attention to Government's No. 7 for identification, on application and certification purportedly made out by Gordon W. Lauridsen, do you know Mr. Lauridsen? A. Yes. * * *

Q. Did he accompany Mr. Taylor at the time that this application was made out? A. Yes.

Q. Will you indicate to the court and jury on that application and the priority certificate which is contained in Government's 7 for identification what parts were in your handwriting and what parts are in Mr. Lauridsen's?

Mr. Lavine: To which we object as irrelevant, incompetent and immaterial, not within any of the issues of the indictment.

Mr. Harrington: If the court please, I will connect it up by Mr. Taylor's testimony.

The Court: Very well. Overruled.

A. Items 1, 2, 6, 7, 9, Mr. Lauridsen's handwriting.

Q. By Mr. Harrington: Excuse me just a moment, Mr. Wrabeck. With respect to '(c) Description of enterprise' and the handwriting 'transporting oil' whose handwriting is that? A. Mr. Lauridsen.

Mr. Harrington: Proceed.

Mr. Lavine: May all these answers be subject to that first objection which we made as irrelevant, incompetent and immaterial?

The Court: With respect to Exhibit 7 for identification?

Mr. Lavine: Yes, your Honor.

The Court: It will be understood that the same objections are made on behalf of both defendants.

Mr. Baughn: Yes, your Honor. I join in those objections.

The Court: Overruled. Proceed, Mr. Witness.

A. Item 10. '6 Truck Oil Refueler', Mr. Lauridsen's handwriting. I placed the Government's seal and it is my signature.

Under item 18 I affixed the date stamp 'Jul 11 1946' and Mr. Lauridsen signed his name.

Under 19, all my handwriting.

Under 'Remarks:' I signed my name and affixed the date.

On Form 63, the priority, is Mr. Lauridsen's handwriting.

Q. By Mr. Harrington: Do you recall the occasion of Mr. Taylor and Mr. Lauridsen coming into your office to be certified? A. Yes.

Q. And were they certified on the date that the application form contained in Government's 6 for identification bears, on that date? A. July 11, 1946.

Q. And did you have any conversation with Taylor and Lauridsen? Did they come in together? A. Yes." [R. 156-158.]

"Mr. Baughn: * * * I also wish to make the further objection that I can't see any foundation laid for Mr. Lauridsen, any conversation made by him, as being binding on any of these defendants; and I make the objection that that portion be—well, the portion that is already in in connection with him, be stricken. And I object to the question just put on the ground that it is calling for testimony which has no bearing on the issues of this case whatsoever.

Mr. Lavine: I join in that objection on behalf of the defendant Todorow.

The Court: The objection is overruled, * * *" [R. 158-159.]

"The Court: What is the materiality of the Lauridsen transaction? It is not in the indictment.

Mr. Harrington: It is 'other similar acts' going to the defendant's intent.

The Court: Is it offered to prove the transactions alleged in the indictment?

Mr. Harrington: Well, if the court please, I think I have to explain the situation. Taylor and Lauridsen were together at all times.

The Court: You do not need to go into that. Any evidence as to any transaction with Lauridsen, ladies and gentlemen of the jury, may not be considered by you and will not be received here as evidence tending to prove any of the transactions alleged in the indictment.

The fact that there might have been a transaction involving Lauridsen which is not alleged in the indictment is no proof that the transactions alleged in the indictment which did not involve Lauridsen ever took place. If you find from the evidence that the transactions alleged in the indictment or any of them took place, then you may consider the evidence of a transaction involving Lauridsen for the purpose of determining the intent with which the defendants acted in doing the acts charged in any count of the indictment, if you find from the evidence that they did those acts, but you may consider it for no other purpose." [R. 160-161.]

"The Court: I did not exclude the evidence as to the Lauridsen transaction. I simply told the jury—and I will tell them again—that proof of the transaction with Lauridsen does not tend to prove some other transaction. The Lauridsen transaction is not mentioned in the indictment here. These defendants are not charged with anything in connection with the Lauridsen transaction; so it could be admitted here and could only be considered by you in the event you do find from the other evidence in the case that the defendants did do the acts charged in one or more counts of the indictment. If you do find from other evidence in the case that the defendants did the acts charged, then you may consider the Lauridsen trans-

action, if you believe that evidence, in connection with determining whether or not the defendants acted knowingly and wilfully, or whether they acted by mistake or inadvertence or for other innocent reasons.

In other words, you may consider the Lauridsen transaction, if you believe the evidence as to it, in determining the state of mind with which the defendants acted, if you find from other evidence in the case that they did the acts charged in the indictment.

Mr. Baughn: Your Honor, still we would like to object to the testimony on the ground that we believe that it is incompetent, irrelevant and immaterial and has nothing to do with the charges in the indictment.

The Court: I understand that both defendants have made that objection and it is overruled.

Mr. Lavine: Yes; we join in that.

The Court: All the evidence is received as to the Lauridsen transaction for the limited purpose and for the only purpose just stated by the court to the jury." [R. 165-166.]

Motions were made to strike the testimony as to the Lauridsen transactions as not part of the *res gestae,* which motions were denied [R. 325-326].

It was prejudicial error to admit the Lauridsen transaction for the purpose of showing intent. Evidence of intent is not admissible. The Court admitted the Lauridsen transaction "for the limited purpose of determining the state of mind with which the defendants acted", but it is basic and elementary that proof of one offense cannot be based upon proof of some other offense. (*People v. Albertson,* 23 Cal. (2d) 550.) Particularly is this true in the case of a charge of making a false statement in a matter within the jurisdiction of the United States. It is no proof that one who made a false statement in one re-

spect might have made another false statement with reference to something else. Therefore, the admission of this transaction was highly prejudicial.

The Court erred in the admission and exclusion of the following evidence relating to a dealer's license number on the application of Todorow:

"Q. By Mr. Harrington: Mr. Todorow, I would like to call your attention to this exhibit, Government's Exhibit 2 which is in evidence and which is an application form. Have you seen that before? A. Yes; I have.

Q. And did you fill that out at Port Hueneme on or about the date it bears? A. Yes; I did.

Mr. Lavine: Objected to as improper cross examination.

The Court: Overruled.

The Witness: Yes; it is.

Q. By Mr. Harrington: And the back of it? A. Yes.

Q. Did you see this 'Dealer License 11-135' put on there? A. No; I didn't.

Q. Did you have a conversation with anyone at at the War Assets Administration about that license number?

Mr. Lavine: Objected to as incompetent and irrelevant.

A. I don't know anything about that license number.

Q. By Mr. Harrington: Do you know whose license number that is?

Mr. Lavine: Objected to that as incompetent, irrelevant and immaterial. A. No; I don't.

Mr. Lavine: Not within the issues of this case.

The Court: Overruled.

Mr. Harrington: Did you rule, your Honor?

The Court: Overruled. Please wait until the objections are made before you answer.

Q. By Mr. Harrington: You say now you don't know whose license number that is? A. No; I don't.

Q. Is that in your handwriting? A. No; it is not.

Q. Did you tell anybody to put that down?

Mr. Lavine: I object to that as irrelevant, incompetent and immaterial.

A. I don't recollect anything about that part of the statement.

Mr. Lavine: Just a minute, just a minute, Mr. Todorow. Please let me get an objection in. I object to it as irrelevant, incompetent and immaterial not within the issues in this case.

The Court: Overruled.

Q. By Mr. Harrington: Now, Mr. Todorow, I will ask you if it is not a fact that that license number 11-135, contained on that application is the license number of the Ross-Ketchum Company in Saratoga, New York?

Mr. Lavine: Just a minute, I will object to that as irrelevant, incompetent and immaterial, not within the issues of this case, and assign the asking of that question as prejudicial misconduct, and ask the court to instruct the jury to disregard it.

The Court: Overruled.

Mr. Lavine: Will your Honor pass on my assignment?

The Court: Please read it, Mr. Reporter. Please read the question, Mr. Reporter.

(Question read by the reporter.)

A. I—

Mr. Lavine: I object to that as improper cross-examination—

A. No. I don't know even who the people are.

The Court: Just a minute. Mr. Lavine, had you finished?

Mr. Lavine: No, your Honor.

The Court: Please rise to make your objections in this court.

Mr. Lavine: Yes, your Honor. I object to it as improper cross examination.

The Court: Objection overruled. Now, you may answer.

A. I don't know. I don't even know who the people are.

Q. By Mr. Harrington: Did you ever work for a company by the that name? A. I never did.

Mr. Lavine: I object to that as—will you wait until I make my objection, please? I object to it as irrelevant, incompetent and immaterial, not within the issues of this case, and assign the asking of this question as prejudicial misconduct, and ask your Honor to instruct the jury to disregard the question.

The Court: Objection overruled, the requested instruction is denied, the answer may stand." [R. 302-305.]

At the close of the case, a motion was made to strike this testimony from the record on the grounds that it was irrelevant, incompetent, and immaterial, not within the

issues, that it was prejudicial misconduct, and that it was a separate offense not on trial. The Court overruled the objections. [R. 324-326.][2]

The defendants moved to strike out any testimony regarding the license number on the defendant Todorow's application [R. 261 *et seq.*]. The Court denied the motion, saying:

> "* * * the Government would be entitled to show that he put materially false statements in his own application as affecting his own credibility here as a witness on the stand, in my view." [R. 263.]

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[2]Mr. Lavine: At this time, Your Honor, at the close of the case we again renew our motions to strike the testimony of the two defendants with reference to any questions asked of them with relation to those licenses, this New York license.

The Court: Does that include the questions asked by the juror about it a few minutes ago?

Mr. Lavine: No, Your Honor. I will not exclude any questions asked by the juror on that question as being irrelevant, incompetent and immaterial, not within the issues of the case on the act in question, which relates to another alleged offense not pertinent here, and that it was prejudicial misconduct on the part of the prosecutor to ask the question.

The Court: What is the offense? Perhaps you would be more specific. I do not see any question of any other alleged offense.

Mr. Lavine: Your Honor, if a statement was made on that application which was untrue in any form and in which the defendant is properly held responsible, it would also be a false statement in a matter within the jurisdiction of the United States and would not be this offense on trial here.

The Court: Why did he not claim his privilege, then, if he did not wish to testify in respect to it?

Mr. Lavine: I do not think he had to, Your Honor.

The Court: I did not compel him to testify with respect to anything that might tend to degrade or incriminate him.

Mr. Lavine: I make my objections, Your Honor. I have made my motion.

The Court: There was no objection made upon that ground. I heard you weakly say that you thought it was incompetent, irrelevant and immaterial. I never heard any such objection as that made. No suggestion was made to me that this defendant was being called upon to testify to something that might tend to in-

This was prejudicial error, as one cannot be impeached by the Government on testimony that the Government itself put on by way of its own direct evidence. The defendant was not on trial for what he put in his own statements. The charge of causing someone else to make a false statement in a matter within the jurisdiction of the United States could not be aided by a claim that something appeared in the defendant's own statement which the Government introduced in evidence itself and then sought to show that this particular statement was untrue.

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criminate or degrade him. The only thing I saw in it was an attempt at impeachment as to what his business was. The opening statement had been made to the jury, as I recall, that he was an automobile dealer in New York.

Mr. Lavine: That is right—not he. He was an exporter and importer, as I recall the opening statement as to him, but the other defendant was an automobile dealer in New York.

The Court: And you both questioned this man, the certification clerk Wrabek, at some length about that, didn't you?

Mr. Lavine: Not as to that part, Your Honor.

The Court: Did you not ask him about who gave him the information and put those numbers in there?

Mr. Lavine: I did not. However, that is my objection, Your Honor, on that. And I also have a motion to strike on the testimony of Taylor as to the acts and conduct of Lauridsen as relating to matters of conversation, not all transactions, but of conversations which were had purportedly with Lauridsen as to other alleged transactions or dealings.

The Court: That was supposed to be part of the *res gestae* here, was it not?

Mr. Lavine: Not as to Lauridsen, Your Honor.

The Court: That conversation you are referring to is the dispute that occurred when these defendants are alleged to have bought the caterpillar and attempted to pay Lauridsen?

Mr. Lavine: Yes.

The Court: Which took place at some time in the automobile?

Mr. Lavine: Yes. The *res gestae* of this offense, Your Honor, is what happened in the certification shack, not what happened in that conversation.

Those are my motions, Your Honor.

The Court: Very well; the motions are denied."

The evidence thus admitted was highly prejudicial. The Government had introduced the application of Todorow made at an earlier date when certifications were required.

Fish v. U. S., 215 Fed. 545, 551;

Tinsley v. U. S., 43 F. (2d) 890, 893;

Hall v. U. S., 235 Fed. 869 (9th Cir.);

Bird v. U. S., 180 U. S. 356;

People v. Glass, 158 Cal. 650, 659.[3]

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[3]In *People v. Glass* the Court said:

"* * * Such evidence is uniformly condemned, as tending to draw away the minds of the jurors from the real point on which their verdict is sought, and to excite prejudice, and to mislead them. It was improperly received, and the exception to its admission well taken."

The Court points out:

"The zeal, unrestrained by legal barriers, of some prosecuting attorneys, tempts to an insistence upon the admission of incompetent evidence, or getting before the jury some extraneous facts supposed to be helpful in securing a verdict of guilty, where they have prestige enough to induce the trial court to give them latitude. When the error is exposed on appeal, it is met with the stereotyped argument that it is not apparent it in anywise influenced the minds of the jury. The reply the law makes to such suggestion is: that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless."

V.

The Trial Court Was Guilty of Prejudicial Misconduct Towards the Defendants, Which Deprived Them of a Fair Trial and the Effective Aid of Counsel in the Trial of Their Case.

From the very start of the case the trial judge was "touchy" toward the defendants and their counsel.

When the case was first called, present defense counsel appeared in Court and asked for a delay of only two days, as one of the defendants was ill in New York and weather and flying conditions were then bad. Present counsel told the Court that he was not familiar with the facts of the case, he was just getting into the case, and requested only two days time [R. 48-49]. This was resisted by the Government in a lengthy argument [R. 52 *et seq.*], the Court finally stating to present counsel: "You did not make the arrangement, so we won't permit you to alter the arrangement. They can answer for themselves on this situation" [R. 54].

The Court declined a continuance and ordered the case to trial the next morning. Defendant Ely Todorow flew from New York and was in court the next morning when the case was called. Present counsel presented a doctor's affidavit as to defendant Potolski being under the doctor's care and that he should continue treatments for a further short period [R. 56]. The Court ordered the case to proceed to trial. At the suggestion of the Government that they did not like to split up the case, the Court continued the case for two days on the assurance of defense counsel that he would have the defendant Potolski in Court even though he was a veteran under the doctor's care [R. 65].

The Court stated that if he was not present within the two day period his bail would be forfeited, and defense counsel assured the Court that he would do everything possible to be ready and that he would work day and night to be ready [R. 66]. This he did on the reliance that the defendants were out on bail and he would have ample opportunity to confer with them and to have their assistance in locating witnesses and in getting information.

After the trial started the Court then took time out to question the defendants about "their failure to be present here Tuesday" [R. 82]. Although defendant Todorow was present on Tuesday (having flown all night to respond to the Court's order), the Court nevertheless insisted on addressing both defendants. They described their airplane flight [R. 82-83]; but in spite of that fact and the doctor's affidavit as to the defendant Potolski, the Court without any authority at law ordered them "into custody of the Marshal for the duration of the trial" [R. 85].

Thereafter defense counsel told the Court that he had raised the question as to "whether your Honor would feel prejudiced in any way against these defendants by reason of the things that they were not responsible for, but their attorneys in New York" were responsible for [R. 86]. The Court denied that he was prejudiced against the defendants, although he had just committed them to jail. Defense counsel then told the Court that he had not given the defendants a chance to show that they personally had no responsibility for what happened and that committing defendants to jail would deprive counsel in this case of all that has to be done to adequately prepare these men in their defense [R. 87] and that the Court was depriving the defendants of a fair trial. The Government went

into a lengthy explanation of what happened, and apparently what was irking Government's counsel was that the original continuance had been arranged in Washington and not in Los Angeles. It was shown that the defendant, Potolski, who had served with Patton all over Europe, was in ill health and was being given a course of treatments [R. 94] which had not been completed. The defendants themselves did not know anything about what was going on except that Potolski was told that he could stay to take his medical treatment and get his medical care before the trial [R. 97].

The Court nevertheless kept the defendants committed for several days, and defense counsel was required to file a writ of habeas corpus and present arguments and take up considerable time which ordinarily was needed for the preparation of the case for trial, which had commenced on such short notice in so far as defense counsel was concerned.

Throughout the trial the trial judge kept pushing the trial, holding sessions, including Saturday, and the trial judge kept "needling" defense counsel in the presence of the jury, although he asserted that he had no prejudice against defense counsel because of what had happened.

Thus, during the questioning of Curtis Alexander the Court stated:

> "The Court: Just ask him questions, Mr. Lavine. Let us not review his testimony. Just ask him questions.
>
> Mr. Lavine: I am trying to clarify his previous testimony, your Honor.
>
> The Court: Let us not talk about his testimony. Just ask him questions." [R. 123.]

Again, the Court later on said, as counsel started to question the witness about his direct examination:

> "Q. By Mr. Lavine: You testified on direct examination—
>
> The Court: Now, none of that, Mr. Lavine. Just ask him questions. * * *" [R. 126.]

In connection with the custody of the defendants, a little later on the Court said:

> "The Court: In other words, your theory is that the court might lock up the jury, but is not privileged to lock up the defendants during the trial?
>
> Mr. Lavine: Not my theory. It is the law, and I expect to show your Honor the rule and the statute that cover the subject. And that happens all the time, your Honor; jurors are locked up but defendants are not.
>
> The Court: It is discretionary with the court, isn't it?
>
> * * * * * * * *
>
> Mr. Lavine: No, sir; it is not, your Honor." [R. 130.]

Later, regarding the locking up of the defendants during the trial, the Court made this comment:

> "The Court: These defendants are not as strong as I was led to believe they should be in the opening statement you made to the jury yesterday, when you described them as members of the Third Army who followed Patton all over Europe and had been through a tough campaign in the Army. It seems to me that sleeping over in jail would be a picnic compared to some of the hardships that the men following Patton all over Europe would have sustained.

Mr. Lavine: Certainly, and the outcome of that may result in very serious consequences, Your Honor.

The Court: I have not seen any evidence of it. The defendants look very healthy to me, both of them." [R. 135.]

Defendants asked leave to file affidavits and the Court said:

"* * * I do not want any affidavits when he is here in the flesh." [R. 136.]

His questioning of the defendant Potolski [R. 137] reflected the attitude of the Court. The Court wanted the record to show that the defendants looked very well dressed, neat and clean, and stated "* * * the defendants look as neat and clean and well dressed as their counsel. That is the way they appear in court." [R. 138-139.]

The Court engaged in considerable questioning throughout the trial. While counsel were looking over a catalogue which was being shown to a witness, Government's counsel said it was a little disconcerting to have both counsel up here, and the Court stated:

"Yes. Mr. Lavine and Mr. Baughn, you will both take your seats." [R. 180.]

Again, on cross-examination of the Government's principal witness:

"Q. You know now that you did commit a felony at that time?

Mr. Harrington: I object to that, Your Honor. There is no evidence of that.

The Court: You do not need to answer that. Put another question.

* * * * * * * *

The Court: You know better than to ask a question like that of the witness." [R. 204.]

A little later on cross-examination of the same witness:

"Q. (By Mr. Lavine): Did you have two arguments with the clerk?

The Court: Do not characterize them as 'arguments.' You know better than that. Ask him what was said and done.

Q. (By Mr. Lavine): You, yourself, have described it as a misunderstanding. Was it a misunderstanding or an argument? Will you tell us what it was?

The Court: Ask him what was said and done. The jury will decide whether it was a misunderstanding or an argument." [R. 205.]

Earlier in the case the Court conducted considerable questioning of witnesses, which was objected to [R. 143]. During the testimony of the defendants themselves, the Court from time to time indulged in questioning and questioned the defendant Potolski [R. 234, 235, 244, 253, 260].

It is the practice of the Court to compel counsel to ask questions standing by the lectern in the court room. During the questioning of defendant Todorow, counsel asked the Court if he might question the witness sitting down as he was quite fatigued. The Court declined the request [R. 291], stating:

"I think it expedites matters, Mr. Lavine, to stand there and ask the questions, and perhaps it won't be so long between questions if you are standing."

Later on, during the making of objections, the Court said:

"You have stated your objection. And you see the rules there on the table?

* * * * * * * *

"Objection sustained." [R. 319.]

The rules of the trial court require counsel to stand when making objections. We do not have any objection to the rules, but cite this merely to reflect the attitude of the Court.

At the very outset of the argument to the jury, the Court immediately interrupted counsel [R. 329].

Counsel for appellant had called the main witnesses, who had testified to falsifying, "wilful liars," and "if they lie on one occasion, are you going to take their word on another occasion?" The Court in the presence of the jury told counsel not to use that word [R. 330].

The word "liar" is not an epithet. It is a statement of fact which, if the witness is to be believed, he had branded himself.

"Liar" is defined as "One who intentionally utters that which is false; especially, one addicted to lying." (Funk & Wagnalls New Standard Dictionary.)

Again, the Court said:

> "The Court: Mr. Lavine, there may have been a dozen men in the certification shack. Be specific, please, and let us get along.
>
> Mr. Lavine: I have not finished my question, Your Honor.
>
> The Court: You know better how to ask questions than that. Proceed, please.
>
> Q. By Mr. Lavine: Do you remember the Government official who was in charge of the certification shack? Thank you, Your Honor. I was not—
>
> The Court: You do not need to thank me. Just proceed." [R. 202.]

> "Q. Well, do you remember Mr. Wrabeck reading paragraph 18 of this Government's Exhibit 7, your application for surplus property, to you?

The Court: That is an improper question. Ask him whether he did read it to him.

Mr. Lavine. Well, I was testing his memory, Your Honor. That is the first objective.

The Court: You are assuming facts not in evidence.

Mr. Lavine: All right.

The Court: No one ever said he read it to him. There has been no testimony to that effect." [R. 203.]

In the charge to the jury the Court gave the jury an instruction that "Statements and arguments of counsel, and stage-play and acting and flirting with the jury by counsel are not evidence in the case" [R. 339].

As stated by the Supreme Court in *Bihn v. U. S.*, 328 U. S. 637:

> "So read, the instruction sounds more like the comment of a zealous prosecutor rather than an instruction by a judge who has special responsibilities for assuring fair trials of those accused of crime."

As stated in *Quercia v. U. S.*, 289 U. S. 466, 469:

> "This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. * * * The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' * * * He may not charge the jury 'upon a

supposed or conjectural state of facts, of which no evidence has been offered.' United States v. Breitling, 20 How. 252, 254, 255, 15 L. ed. 900, 902. It is important that hostile comment of the judge should not render vain the privilege of the accused to testify in his own behalf."

Just as this case held it was improper for the Court to make comments which might strip the accused of the benefit of his testimony, so the accused had the right to have his own counsel not stripped of the full benefit of effective argument in his behalf. In the *Quercia* case, the judge, dealing wtih a mere mannersim of the accused in giving his testimony, put his own experience in the scale against the accused. In the present case the judge, dealing with his own dislike of defense counsel's smiling and pleasantness in the coutroom, which he called mock courtesy and flirtation with the jury, put all the weight that could be attached in the scale against the accused's counsel to the prejudice of the accused. This necessarily created prejudice in the minds of the jury, which precluded a fair and dispassionate consideration of the evidence.

In the argument on objections to the instructions, the Court evidenced his attitude in the matter:

"* * * You are a smart and able lawyer, and I am tired of your tactics. * * *

I am going to start stopping you every time you appear in my court, and describe in the stenographic record the kind of remarks, the smiling, and your mock courtesy that you produce here in this court" [R. 347].

The Court committed the defendants immediately upon their conviction to custody of the marshal, although he stated at first "I am ready to sentence the defendants any time they request it" [R. 352].

The Court deferred sentence and put the defendants in jail for the period he referred it to the Probation Officer, and then immediately remanded the defendants to custody of the marshal to await sentence [R. 353].

At the time of sentence Government counsel recommended fines and a jail sentence [R. 40]. The Court promptly ignored the recommendation of the Government and sentenced the defendants to the penitentiary and declined to fix bail pending appeal [R. 40].

Later, on application this Court fixed bail pending appeal [R. 363].

One of the essentials of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States is a fair trial. (*Duncan v. Kahanamoku,* 327 U. S. 304.) One of the essentials of fair trial is not only that a defendant have counsel, but that he have ample time to prepare his defense, and the uninterrupted service of counsel by a division of his work.

Glasser v. U. S., 315 U. S. 60;
Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158;
People v. Simpson, 31 Cal. App. (2d) 267.

Another essential is that one not only have counsel, but have the effective aid of counsel and that nothing be

done in the preparation of the trial of the case to impede counsel.

Powell v. Alabama, supra;
Smith v. O'Grady, 312 U. S. 329, 85 L. Ed. 859;
Williams v. Kaiser, 323 U. S. 471, 474;
Glasser v. U. S., 315 U. S. 60, 76;
Johnson v. Zerbst, 304 U. S. 458, 468;
Waley v. Johnson, 316 U. S. 101, 104.

In this case counsel relied on the time he would have to confer with his clients outside of Court, in view of the unusual situation that developed, and he was willing to forego other matters to give him an opportunity to confer with his clients and get other necessary witnesses. It was his right to rely on the fact that the defendants who were out on bail would not be committed during the course of the trial of the case. The trial judge was confused with the rule in the State of California, but not obtainable in the Federal Court. The defendants had made every effort to return. The defendant Todorow was present and ready for trial at the time set and Potolski furnished the Court with a doctor's affidavit, which was at no time controverted or denied. When the Court continued the matter for a two-day period, he also was present in Court, even though he had been ill and was under a doctor's care.

It was, therefore, highly prejudicial for the Court to commit the defendants to the custody of the marshal and sheriff and keep them in jail during the course of the trial when their time was necessary for proper preparation of the case, and likewise it deprived their counsel of full and adequate opportunity to prepare the case for proper presentation to the jury.

Such procedure denied these defendants fair trial guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States.

It has been frequently held that a denial of the right of counsel of one's choice violates due process of law, and may even enable a writ of habeas corpus to run. This was held in the following cases:

People v. Alabama, 287 U. S. 45, 77 L. Ed. 58;

House v. Mayo, 324 U. S. 42, 49, 89 L. Ed. 739;

Williams v. Kaiser, 323 U. S. 471, 89 L. Ed. 398;

Rice v. Olson, 324 U. S. 786, 89 L. Ed. 1367;

White v. Ragan, 324 U. S. 760, 89 L. Ed. 1348;

Tompkins v. Missouri, 323 U. S. 485, 89 L. Ed. 407;

Avery v. Alabama, 308 U. S. 444.

It would be meaningless to give one counsel of his choice and then make it impossible for that counsel to give full and effective aid, by reason of extraneous matters of the court's own conduct.

Glasser v. U. S., 315 U. S. 60.

The whole atmosphere of the trial judge was one designed to keep counsel occupied as much as possible with matters other than those involved in the case and thus deprive defendants of the effective aid of counsel of their choice. Defendants' counsel sent his clients out on a Sunday, the only day available, to locate witnesses in their behalf [R. 296].

The Trial Court Erred in Refusing Defendants a Bill of Particulars.

A defendant in a criminal case is entitled to a bill of particulars to enable him to prepare his defense. The defendants merely asked for data regarding forms and statements which it was claimed were made, and which were confidential in the possession of the Government.

Even under the new rules, where documents are in the possession of the Government, an order for their inspection is allowed, and here the defendants requested only that data and the data regarding the persons to whom the alleged false statements or representations were made, in order that they might learn all of the facts surrounding the transaction from the witnesses available.

It was, therefore, error to deny such a request.

Glasser v. U. S., 315 U. S. 60-90, 86 L. Ed. 680;

Floren v. U. S., 186 Fed. 961;

U. S. v. Eastman, 252 Fed. 232;

Kirby v. U. S., 174 U. S. 47, 43 L. Ed. 890;

Hindmer v. U. S., 292 Fed. 679;

Coffin v. U. S., 156 U. S. 432, 452;

Rosen v. U. S., 161 U. S. 29, 35;

Durland v. U. S., 161 U. S. 306, 315;

Case v. U. S., 6 F. (2d) 530;

Rules of Criminal Procedure, Rule 7(f).

Conclusion.

For which reasons appellants and each of them pray for reversal of the judgments and for an order directing entry of judgments of acquittal as to each defendant.

The motion for a bill of particulars was made on the day of the arraignment of the defendants.

Respectfully submitted,

Morris Lavine,
Attorney for Appellants.